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ABSTRACT

In recent years, according to the author, an outpouring of federal and state laws and judicial rulings has led educators to feel that they are subjected to unreasonable regulation. To examine the possible causes and cures of this feeling of regulatory intrusiveness, the author compares the regulation of business with the regulation of education. In discussing each field, the author covers, first, overinclusive regulations, legalistic enforcement, costly compliance measures, and other factors that he considers make regulatory programs both unreasonable and ineffective. Next the paper describes strategies of regulatory reform--especially flexible enforcement--that might curtail regulatory unreasonableness. Finally, the obstacles to flexible enforcement are analyzed, including enforcement officials' fear of scandal, their disapproval of nonuniform treatment, and their imperviousness to arguments based on regulatory costs. (Author/RW)

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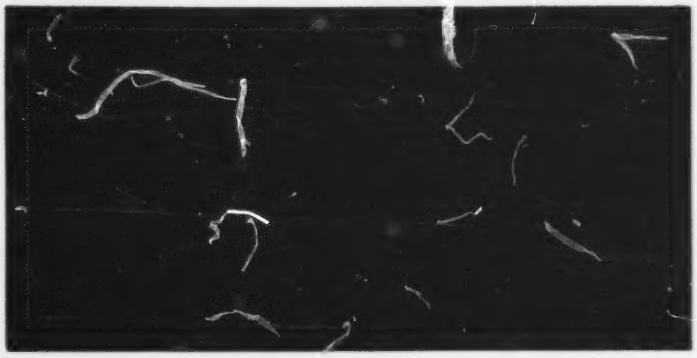

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REGULATING BUSINESS, REGULATING SCHOOLS: THE PROBLEM OF REGULATORY UNREASONABLENESS

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July, 1981

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Abstract

In all regulatory systems, requirements designed to control the recalcitrant tend to impose unreasonably costly and annoying restrictions on the majority of regulated organizations. In many health, safety and environmental regulatory programs, this tendency has been exacerbated by reforms intended to make enforcement tougher and uncompromising; the result has been resentment by regulated businesses and impairment of regulators' ability to secure cooperation, the sine qua non of true effectiveness. Similar dynamics toward unreasonableness and wasted effort have developed in categorical grant programs designed to improve education for disadvantaged children. Moreover, a flexible enforcement strategy, which might reduce such problems, is inhibited by the uncertainties and risks of scandal faced by enforcement officials, and by legal and administrative attitudes that view rules and rights as impervious to arguments based on compliance costs and that regard non-uniform treatment as illegitimate.

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In recent years, educators have expressed dismay about the "legalization" of school administration and of the educational process itself. Law and education are seen as conflicting ideals. Of course, schools have long been subject to a dense web of legal controls, such as the state statutes that dictate periods of attendance, establish credentials and tenure rules for teachers, and prescribe some curricular elements, such as mandatory American history courses. But such laws generally are legitimated by tradition or consent; rarely do they lead to major disputes and almost never to lawsuits. Today's "legalization" outcry relates to a more recent and controversial outpouring of judicial rulings and statutes (federal as well as state) that often are experienced by local educators as excessive impositions on their discretion and authority.

These "intrusive" laws and judicial predecents are quite varied. Some are direct restraints on the authority of school administrators, designed to ensure their powers are used fairly. Thus students have been accorded the right to due process of law in disciplinary matters, teachers have obtained new legal guarantees against discriminatory treatment, and parents have been granted broader rights to participate in or consent to decisions affecting their children. Nowadays, therefore, a school administrator easily can become involved in a lawsuit--or at least feel compelled to consult the school system's lawyers--concerning a security guard's attempt to search a student suspected of concealing drugs, a principal's suspension of a disruptive student, a teacher layoff plan that undercuts affirmative action goals, or failure to consult a parent advisory committee on certain issues.

Other legal constraints concern educational quality. According to one recent count, 33 states have enacted laws establishing standards for educational achievement and competence. And between 1963 and 1974, state legislatures passed 73 laws promoting accountability.[1] From these laws stem thick books of regulations dictating the tests that local schools must administer and the certifications and reports they must file.

An even more pervasive source of legal constraints--the source that will be most central to this essay--are the numerous federal and state statutes concerned with social equality in the schools. These include laws and categorical grant programs designed to induce or compel local districts to provide a better education for racial minorities, the economically disadvantaged, non-English-speaking students, mentally and physically handicapped students, as well as equality between the sexes in athletics, curricular and extra-curricular offerings and facilities. Typically, these laws, too, impose extensive reporting requirements in school districts and demand regular student testing in order to ensure that federal and state funds are spent lawfully, fairly and effectively. Such provisions usually are enforced by federal or state "auditors", and in some cases, because they are couched in terms of substantive and procedural rights for members of the beneficiary groups, they also can be enforced by private lawsuits.

Most critics of "legalization" do not question the ends sought by programs to benefit disadvantaged students. They complain of the pursuit of those ends through detailed mandatory regulations, bureaucratic monitoring and litigation over legal rights. They claim that school administrators and teachers, anxious to avoid trouble with "the law", are forced to devote too

much time to formalistic compliance, paperwork and ultimately meaningless legal procedures. Priorities, it is said, are distorted. Money is wasted. Fear of legal action engenders a cautious, legalistic attitude by educators that further drains the schools' already depleted reservoirs of trust and authority.

One may be tempted to dismiss such complaints as self-serving rhetoric by local administrators who simply want to be let alone, or as an overreaction to conflicts that inevitably accompany the first few years of any governmental program that seeks far-reaching social and organizational change. Labor legislation initially fought tooth and nail by employers in the 1930s, for example, gradually came to be accepted without engendering much legal conflict or complaint.[2] And after all, like labor legislation, laws requiring educational programs for the disadvantaged are redistributive in effect. They require the redirection of a certain amount of educational attention and financial resources away from the mass of middle class and upper-working class students who traditionally have been at the center of educators' concern (and whose parents have been the core of educators' political support). Given such redistributive goals, detailed legal prescriptions and monitoring clearly are needed, and a considerable amount of legal coercion should be expected. Indeed, notwithstanding complaints of "legalization", it is not difficult to document a substantial incidence of legal noncompliance on the part of local school districts, or instances of inadequate rather than over-aggressive enforcement. From this perspective, there is perhaps not enough "legalization", and if enforcement entails costly or annoying adherance to bureaucratic reports and legal processes, that is simply the small price that must be paid for effective and important social change. The problem, in this view, is not in the laws and regulations but in the attitudes of educators.

There is a good deal of power in this defense of legalization. To think that redistributive measures could be accomplished without legal rules and pressures, on the basis of exhortation and "trust" of local educators alone, surely is utopian. But it is also a mistake to dismiss complaints about legalization as unfounded or unimportant. Instead, both defenders and critics of legal controls in education might benefit from recognizing a recurrent paradox in the way legal controls tend to operate: those who point to noncompliance and inadequacies in the legal control system and others who point to overly-controlling legal rules both may be correct. They simply are pointing to different slices of reality. Among any population of regulated individuals or organizations, there always will be some "bad apples" who disregard or evade applicable social goals and legal norms; with respect to these, the applicable rules and enforcement procedures will not seem strict enough. But in the same population, there will be others--"good apples" we might call them--who, for reasons of belief or concern for reputation or fear of legal "trouble", generally act in accordance with the general thrust of the law, and yet who have entirely valid complaints about the way detailed regulations or broadly-stated legal rights (designed primarily to cope with the bad apples) work out in their particular case. Thus customs regulations and inspections may be insufficiently tough and thorough to deter the most sophisticated smugglers and at the same time be infuriatingly intrusive and time consuming in the eyes of ordinary travelers. Every legal system must confront the problem of "unreasonableness" vis-a-vis the "good apples" as well as the problem of "effectiveness" vis-a-vis the "bad apples",

for to disregard the complaints of excessive legal control by the more responsible citizens--who usually comprise a majority of the population to be controlled--ultimately may erode the legitimacy of the law itself.

This recurrent problem leads to fundamental questions of legal strategy, and indeed of legal philosophy, that are quite relevant to the issue of "legalization" in schools. Is the ex erience of excessive "legalization" an inevitable feature of the imposition of law and the attempt to make it effective? Or is it, at least in part, a product of a particular set of legal concepts and strategies that currently are prevalent? Is it possible to implement a system of legal controls that would be more flexible, that could impose lesser constraints on "good apples" than "bad apples", that would advance the goals of equity in education and at the same time minimize the constraints, burdens and inefficiencies the regulations impose on the majority of schools? The answers are by no means readily available. As a matter of abstract theory, it might seem possible to enforce laws and regulations flexibly and selectively rather than uniformly and legalistically, or to amend them in light of experience so as to eliminate unnecessary burdens they place on some citizens or organizations. But in actuality, there are substantial political, bureaucratic and jurisprudential obstacles to flexible adaptation and enforcement of the law. For example, can a legal control system attempt to impose greater restrictions on some than on others without violating fundamental values of due process and equal treatment under the law? Can it be done without creating an unreasonable risk of error (that is, of treating citizens as "good apples" when they in fact are not) or of unduly eroding the deterrent effect of the law?

This essay will not attempt to provide any definitive solutions to these problems. Its more modest goal is to provide some insight into the causes and possible cures for "legalization" in the educational context by comparing the "regulation" of schools with the regulation of business enterprises, a field with a long and varied history and in which problems of "over-regulation" have received a good deal of attention. From such a comparative perspective, the legalization of schools will appear not as a unique but as a generic phenomenon, the product of a particular type of legal control structure, enforced in a particular way. The comparison will be based on my recent study (in collaboration with Eugene Bardach) of regulatory strategies in the fields of occupational safety, food and drug purity, pollution control, truck safety, and other programs of protective regulation.[3] Thus the first half of this essay will (1) explain in some detail why many well-intentioned protective regulatory programs produce "unreasonable" and indeed counterproductive results in large numbers of individual cases, (2) describe strategies of "flexible regulation" that tend to curtail regulatory unreasonableness, and (3) discuss obstacles to the implementation of flexible regulation. The second half of the essay will point out parellels between these aspects of business regulation and the implementation of legal controls in public schools.

I. Regulating Business

The Rise of Legalistic Regulation. The last fifteen years have seen a change in the enforcement style of many regulatory programs designed to protect the health and safety of consumers, workers and the general public, Protective regulation is b no means a recent phenomenon. Starting in the late 19th Century, American legislatures established safety regulations and inspection programs for factories, mines, meat-packing plants, boilers, railroads, shops, water supplies, dairies, and building construction. But traditionally, the relevant regulations and statutes were liberally laced with words such as "reasonable" and "to the extent possible," allowing enforcement officials to adjust general standards to fit individual cases. Enforcement officials, moreover, relied heavily on persuasion, warnings, and informal negotiation to prod violators toward compliance; they sought to avoid time-consuming formal citation and prosecution of violators in court, partly because judges tended to water down statutory sanctions anyway. They espoused the goal of cooperation rather than legal coercion. Similar patterns can be found in contemporary studies of regulatory enforcement in Great Britain and in Sweden.[4]

In the view of many observers, however, the traditional enforcement style--based on discretion, persuasion and conciliation rather than the rule of law--often was too lax. Determined and recalcitrant regulated enterprises could resist major change through drawn-out legal contestation. Enforcement officials, it was charged, were too few in number, often too eager to avoid legal battles, and hence prone to negotiate compromises that unduly sacrificed public protection. Sometimes they were "captured" by the regulated industry.

In response, many safety and environmental-protection statutes enacted in the late 1960s and early 1970s, especially at the federal level, were designed to promote a "tougher" enforcement style. The goal was to establish regulatory systems based on deterrence rather than conciliation and cooperation. Statutes and regulations were to be made more stringent and explicit. Strict rule enforcement and formal sanctions were to replace negotiated settlements. Regulation was to be made more legalistic, in the sense that the behavior of regulatory officials and regulated enterprises alike would be determined by the standards stated in officially promulgated legal rules, and departures from those standards would be swiftly penalized.

To facilitate legalistic regulation, many statutes articulated regulatory goals in absolute terms, omitting such words as "reasonable" that invited judgment by regulators and hence would make them vulnerable to the arguments and influence of regulated interests and their attorneys. For example, all strip-mined land, a 1977 federal law stated, must be restored to its original contours; Congress deliberately rejected language calling for restoration "to the maximum extent feasible." The federal Clean Air Act Amendments of 1970, the Clean Water Act (1972), and the Occupational Safety and Health Act (1970), ostensibly precluded enforcement officials from "watering down" regulatory objectives by taking economic considerations into account; the citizens' "right" to a clean and healthful environment or workplace was to be as extensive as the best available technology will provide. To facilitate uniform enforcement, statutes and regulations often prescribed specific safety or pollution control technologies, "good manufacturing practices", sanitation equipment,

testing procedures and so on. The statutory and regulatory preference was for unambiguous numerical standards and fixed deadlines, as in the 1970 Clean Air Act's requirement of a 90 percent reduction in nitrous oxide and hydrocarbon emissions from automobiles by 1975.

To increase deterrence, many regulatory statutes of the late 1960s and early 1970s increased penalties dramatically and sought to make them easier to impose or even automatic. Criminal penalties were authorized for individual corporate officials. Corporate violations also were made punishable by "civil penalties" of up to $25,000 per day, in order to reduce the incentive for firms to drag out disputes and to invoke the strong procedural protections associated with criminal prosecutions. Some agencies--such as OSHA--were empowered to impose fines themselves, rather than prosecuting violators in court. Other agencies, including the Environmental Protection Administration and the National Highway Traffic Safety Administration, were authorized to issue summary injunction-like orders (recalls, shut-downs) without first having to take the violator to court. To reduce enforcement discretion, in some agencies, (such as OSHA, the FDA, and the federal Mine Safety and Health Agency) inspectors were instructed to issue formal citations for all violations--in OSHA's case, even if the violation is corrected before the inspector's eyes--and fines for all "serious" violations were made mandatory. To further deter informal dispositions by enforcement officials, statutory schemes strengthened the ability of citizen complainants and citizen advocacy organizations to push agencies to enforce the law strictly. For example, California laws concerning quality of care in nursing homes instruct the enforcement agency to conduct an inspection within a specified number of days

after receiving a complaint, to report the results to complainants, to state in writing the reasons for any subsequent dismissal of a citation or proposed penalty, and to penalize any nursing home that attempts to expel or reduce the privileges of a complainant. OSHA regulations empower workers to accompany OSHA inspectors on their rounds and require employers to keep paying them during such consultations; the results of OSHA inspections and the prescribed schedules for abating violations must be posted where workers can see them. Under the Clean Air Act, civil rights acts, and other statutes, complainants and advocacy organizations were authorized to sue alleged violators or the agency itself if regulatory officials failed to enforce the law as written. In addition, many statutes provided for federal monitoring of enforcement by state agencies, for example, by periodic random reinspection of businesses already inspected by state inspectors.

Finally, many regulatory schemes sought to facilitate enforcement by shifting the burden of proof to regulated enterprises, compelling them to assemble and maintain detailed records and reports, documenting their compliance-related activities, ranging from efforts to hire minority construction workers to the frequency of inspection of cranes and hoists. Manufacturers must promptly report to the relevant agency serious workplace accidents, reported incidents of injuries associated with use of their products, "fugitive emissions" stemming from breakdowns of pollution control equipment, research findings suggesting harmful attributes of chemicals, and so on. Pollution sources and mines must install monitoring equipment and make the records available to the government. Food and drug manufacturers must keep

records showing periodic testing and calibration of sterilizing equipment, noting signatures of the personnel who did the tests for each batch and counter-signatures of higher quality control officials. Enterprises were required to obtain regulatory permits for each piece of polluting equipment, for new factories (e.g., from the U.S. Department of Agriculture for meat-packing plants, from the FDA for drug manufacturing facilities), and for an ever-broadening range of new products (not only pharmaceuticals, but new automobile models, gasoline additives, pesticides, chemicals, and medical devices); in these situations, the enterprise must prove in advance compliance with detailed regulations and often must prepare extensive analyses indicating the safety or environmental impacts of the new product or facility.

Legalistic Enforcement and Regulatory Unreasonableness

The shift toward stricter rules, enforcement-oriented inspection and sanctioning systems, and intensified documentation has not been universal. Some older state agencies have been relatively immune from the trend, and all agencies, even the most legalistic, retain some areas of discretion. The reformers may have envisioned an inspectorate that, like Weber's ideal-typical bureaucrat, would be programmed to enforce the regulations as written, "without bias or favor", but inspectors are human beings that resist complete programming. And inevitably they must use judgment in determining where to look for violations, in deciding whether a particular machine guard satisfies the safety rules, or in gauging how soon to return to a site to check up on a promise to abate a violation.

Nevertheless, the shift in the law toward a legalistic, role-oriented enforcement style has had fundamental, clearly tangible effects on regulatory agencies and regulated enterprises alike. Enforcement officials and regulated enterprises both report an increase in strict rule-application, formal citations and penalties and a decline in bargaining at the inspectorial level. Business investment in pollution control and in worker protection equipment has soared. There has been a striking increase in the numbers, salaries, organizational status and intra-organizational powers of corporate specialists hired to "keep the company out of trouble" with enforcement agencies; these specialists include safety and environmental engineers, industrial hygienists and toxicologists, product safety and quality control engineers, auditors and so on. And, as an older California workplace safety official put it, "Before OSHA, most firms almost always tried to do a better job after we surveyed them. Now, with the threat of legal action, they feel compelled to do a better job."

If legalistic enforcement has increased regulatory effectiveness, it also has led to an increased incidence of regulatory unreasonableness. Strict application of regulations can be characterized as unreasonable (1) if compliance does not yield the intended benefits, as when installing a government-mandated safety device does not appreciably improve consumer or worker safety in light of operating conditions and existing controls in a particular factory; (2) if compliance would produce incremental improvements but only at enormous costs, diverting extremely costly capital and human energy from more productive and sociall -valuable uses; (3) if regulation-prescribed facilities or procedures are more expensive than less costly alternatives that are of comparable effectiveness; (4) if regulatory officials are wholly unresponsive to facts and arguments put forward by regulated enterprises indicating that a particular requirement is substantively unreasonable in

one of the three senses first mentioned.

Unreasonableness results first of all from the diversity of the world to be regulated and the difficulty of devising a single regulatory standard that will "make sense" in scores of different copper smelters, nursing homes, and food processing plants, each of which employs a somewhat different technology, a somewhat different staff of workers and supervisors, a somewhat different quality control system. Soon after retiring as Secretary of Labor, with responsibility for implementing several major and scores of minor regulatory programs, Professor John Dunlap complained, "A rule that is fair and workable in New York may be excessively severe or unnecessary in Utah... Uniform national rules may assure equity, but they do not reflect the realit of the workplace".[5] That general rules can yield unreasonable results in particular cases is a familiar problem to legal scholars, but it seems particularly severe in the case of much contemporary regulation. Perhaps that is because the ultimate goal in many programs is to induce an attitude of "social responsibility", whereby plant managers or nursing home administrators are continually alert and sensitive to all of the diverse harmful acts that may result from their technologies and their employees' activities. But a regulation that focusses directly on such attitudes--that would enjoin nursing home aides to "be caring, sympathetic and alert to sources of discomfort", or instruct a plant manager to "be alert to previously unrecognized sources of danger to employees and instill in employees a positive attitude toward safety"--such a regulation would clearly be unenforceable, and probably violative of due process norms as well. Instead, to be enforceable, regulations focus on things the enforcement official can <u>see</u> on his intermittent visits to the site--enduring physical features (such as machine guards or sulfur dioxide scrubbers), fixed inputs (such as maintenance of a specified patient-staff ratio in a nursing home),

and permanent records (such as mandatory charts kept by nurses or quality control engineers, documenting their activities). But these specified facilities, ratios and signatures are only proxies for, rough correlates of, the underlying attitudes of carefulness, attentiveness, cleanliness, etc., that we actually care about. And inevitably those correlations will be imperfect. Some nursing homes will be just fine regardless of their patient-staff ratio (and some will not). A certain wire-stranding machine may be entirely safe, even if it fails to comply with a general rule on guards that applies in an across-the-board manner to all moving machinery in all factories (or it might be dangerous for reasons not specified in any regulations). In sum, given the diversity of the world, the degree of risk posed by any particular regulatory violation will often be rather slight.

The "badness of fit" between general, facility-specifying regulations and the risks that exist in particular establishments, a problem inherent in the elusiveness and unpredictability of sources of harm, is exacerbated by the politics of much contemporary social regulation. Legislatures in the late 1960s and early 1970s not infrequently disregarded the potential costs of regulatory requirements partly because they reacted over-optimistically to proponents' characterization of the problem and available solutions, partly because legislators did not want to be accused of indifference to the rights of workers and consumers to a safe and healthy environment.[6] Legislatures and regulatory rule-makers often overreact to particularly dramatic accidents or egregious instances of corporate misbehavior by promulgating prophylactic rules applicable to all enterprises in an industry, even those who previously

had been induced by market pressures, liability law, or existing regulations to adopt generally adequate controls. As regulations cumulate in response to statistically infrequent but harmful instances of malfeasance or non compliance, they become excessively detailed, mandating precautions A through M, although some practices are quite safe even if steps H through L are omitted, depending on the enterprise's quality control or accident prevention system taken as a whole. Agency officials preoccupied with new and pressing problems have little time or incentive to prune these instances of overinclusiveness from the existing body of rules, especially since carving out exceptions can often be attacked as "caving in" to business or as "taking away rights."

The unreasonableness that stems from overinclusive regulations would be less prevalent if enforcement officials consistently adapted general rules to particular situations, if they "overlooked" violations that are not in fact serious under the circumstances. But such exercises of inspectorial discretion are precisely what the newer legalistic enforcement style sought to prohibit. Enforcement officials are required to cite and penalize all violations. They are not supposed to use their own discretion to accept protective measures other than those prescribed in the regulations. Agencies and individual inspectors whose citation rates fall below the statistical norm are called on the carpet to explain why--and hence they try to avoid that eventuality by maintaining a good statistical record of citations, prosecutions, and fines collected. The individual inspector comes to conceive of his or her job as finding and citing violations of the regulations, without making judgments as to their relative

seriousness, and without engaging representatives of the regulated enterprise in discussions of general regulatory goals and the problems that must be solved to attain them.

The upshot is that compliance specialists in regulated enterprises persistently complain of the legalism and unreasonableness of much regulatory enforcement. In 1979, the Regulatory Council, established by President Carter, commissioned a study of how government regulation is experienced by the citizens who deal directly with enforcement officials. The author, Paul Danacean interviewed 75 businessmen, labor union officers and municipal officials in Janesville, a city of 50,000 people in southern Wisconsin with more than 65 manufacturing concerns. One of Danacean's major findings, illustrated by scores of anecdotes, was as follows:

> "A specific criticism levelled against regulation by supporters and detractors alike is that the people who administer and enforce regulations... are too rigid and unyielding... What the people in Janesville say they want is a spirit of accommodation in which the two parties, the regulated and the regulator, try to work out a mutually acceptable solution to a common problem. What they get, they say, is an adversary relationship in which the regulators more often than not try to force something down their throats because it is written down in a manual, not because it is supposed to be a better solution."[7]

There are no hard measures of the amount of regulatory unreasonableness, but it is surely very high. For example, despite the well-known conceptual difficulties and data weaknesses in cost-benefit analysis, many academic and governmental studies have indicated, often quite convincingly, that expenditures on compliance with certain regulations have not been matched by expected benefits. Numerous studies have shown that despite major increases in expenditures for worker safety (as distinguished from occupational health)

mandated by OSHA, the program has had at best a small positive effect on workplace accident rates.[8] By 1985, water pollution controls compelling the installation of the best available technology will cost about $18-$19 billion per year (including annual operating costs plus depreciation and interest), but the best "point estimate" (as opposed to a range) of benefits is only $12.3 billion.[9] Government economic analysts have repeatedly pointed that major regulations--such as OSHA's strip-mining controls and OSHA's coke oven emission and benzene standards--would entail massive cost increments but only slight incremental benefits as compared with alternative, slightly less stringent standards. These showings of economic inefficiency in the aggregate imply the prevalence of unreasonable impositions in particular cases, especially because even regulations with positive benefit-cost ratios will result in unnecessary requirements in some proportion of regulated firms or devices.

This is not to say that most regulatory rules or individual enforcement actions are unreasonable. The point merely is that legalistic enforcement makes the incidence of unreasonable requirements much higher than it might be, and that the sum total of orders or requirements that are unreasonable under particular circumstances is very substantial.

Regulatory Unreasonableness and Ineffectiveness

Although legalistic enforcement does produce some gains in effectiveness, as noted earlier, legalistic enforcement also prevents regulatory programs from reaching their maximum potential effectiveness of regulatory programs. It does so (1) by diverting efforts of enforcement officials and regulated enterprises alike to mechanical and relatively unimportant preventive measures,

(2) by incurring resentment and legal resistance, and (3) by cutting off cooperation that is essential to effective achievement of regulatory goals.

In a diverse and dynamic economy, regulatory rules that focus on measurable, "enforceable" requirements such as physical facilities and record-keeping inevitably capture only a small proportion of the harms that the program is designed to prevent. For example, studies indicate that even if employers adhered to OSHA regulations perfectly and continuously, workplace injuries could be reduced by only about 10-15 percent.[10] Perfect compliance with nursing home regulations can't guarantee anything close to humane treatment.[11] Postmortems of major accidents, from Three-mile Island to DC-10 crashes to scaffold collapses, typically point to causes other than noncompliance with regulations.[12] At bottom, progress toward socially responsible conduct requires continuous vigilance and imagination and motivation of workers and supervisors; it is a matter of attitudes and knowledge (both technical and organizational), applied to particular contexts. When enforcement is dominated, however, by official checklists and inspectors stress the documentation of rule-violations, they are blinded to novel and fundamental sources of harm that escape the specific rules. Corporate compliance specialists (safety and environmental and quality control engineers, etc.) complain that their efforts and budgets are diverted to preventing rule-based citations and fines, away from problems they regard as more serious. Diversion is exacerbated by the citizen complaints that legalistic regulatory programs stimulate and give priority to: a high proportion of those that are legally "valid"--and a great many are not--involve non-serious violations.[13] Complaints also tend to send inspectors to larger enterprises that have a comparatively good safety or pollution control program. Yet inspectors must respond to all complaints and cite all violations.

For these reasons alone, legalistic enforcement stimulates resentment. When enterprises are penalized for violations they justifiably believe are not serious, or they are ordered to spend money on precautions that seem unnecessary, they denigrate inspectors as ignorant and arrogant nitpickers that provide no help in solving "real problems."

Legalistic enforcement also causes resentment by disregarding not only the seriousness but also the cause of violations. Its underlying image of the regulated enterprise is a unitary, cohesive, profit-maximizing entity, like the firm in economic theory. Violations, in this view, result from deliberate calculation that the anticipated regulatory fine, discounted by the probability of evasion or legal delays, will be small in relation to the savings in compliance costs saved by means of evasion and delay. While may be this is an accurate assumption about some enterprises in general and most enterprises with respect to a few issues, it is probably inaccurate for a majority of firms in most industries on most regulatory issues. Established firms usually have a longer-run view of self-interest. They want to avoid the adverse publicity and disaffection in the marketplace that comes from being publicly labelled a regulatory outlaw, a destroyer of the environment in defiance of regulatory orders, or a vendor of unsafe products that fail to meet regulatory specifications. They want to avoid lawsuits, whose financial impact is much greater than regulatory fines. Moreover, as organization theorists point out, corporations are far from unitary entities, but consist of diverse sub-groups and interests. A great many regulatory violations, in fact, are also violations of official corporate policy and established

safety or quality-control routines; they stem from breakdowns in pollution-control equipment, omissions that occur due to personnel changes, short-cuts from official policy by individual managers seeking to meet short-term deadlines or crises, workers who take machine guards off, and so on. Most violations result, in short, not from economic calculation but from organizational or supervisory failures.[14]

Many other violations stem, in effect, not from "amoral" economic calculation but from principled disagreement with the details of regulations: the enterprise accepts the regulatory goals and makes general efforts toward compliance, but its experts reject certain regulatory requirements or mandated technologies as inappropriate, ineffective, unduly costly under the circumstances. They believe omission or modification of measures prescribed by regulations will not in fact create serious risks of harm in the particular context.

When regulatory enforcement officials cite and punish all violations as if they stemmed from wilful short-term calculation--even those violations that stem from breakdowns in well-intentioned compliance programs or from principled disagreement--managers of regulated enterprises are doubly resentful. They complain that they are "treated like criminals," that their good faith efforts are never taken into account, and that legalistic enforcement officials mistrust them and ignore their arguments.

One of the bitter fruits of resentment is a higher level of legal contestation. Employers often spend thousands of dollars appealing OSHA fines and abatement orders that would cost them far less to absorb without protest. Rates of appeals to administrative hearing officers and the courts have increased dramatically in agencies that have switched to

legalistic enforcement practices. The agencies, in turn, become more legalistic. "Now every inspection must be treated as a potential court case", enforcement officials say, and inspectors spend correspondingly more time recording, documenting and photographing rule-violations, but less time on the factory floor talking to workers and managers.

Another consequence of resentment is destruction of cooperation. If regulated enterprises resent and mistrust enforcement officials, they are less likely to be forthcoming about their problems or indeed any information that they feel will be misinterpreted and converted into a citation. Inspectors, in turn, must focus even more on visible and obvious violations, and are less likely to discover the more serious sources of harm that might be discovered through extensive and frank discussions with corporate compliance specialists.

Reform Strategies: Flexible Enforcement

The logically appropriate "cure" for excessively legalistic enforcement, in most cases, is a more flexible or discretionary mode of regulatory enforcement, a compromise of sorts between indiscrimately coercive legalistic enforcement and the sanctionless, wholly conciliatory approach it was designed to supplant. Stringent rules may well be necessary to provide guidance to regulated enterprises and to give enforcement officials "backbone" and authority. Summary enforcement powers and heavy penalties <u>are</u> needed to deal with the "bad apples" in the regulated industry, and the threat of aggressive enforcement is needed to keep even moderately "good apples" on their toes. The notion of flexible enforcement, however, suggests <u>selective</u> application of formal sanctions--when the violation is, in fact, serious or the offender seems to be lacking in good faith. But flexible enforcement would also require

enforcement officials to be attentive to the potential unreasonableness that lurks in mechanical rule-application. They would be willing and able to suspend strict enforcement when violations are not serious and especially difficult to abate, when they stem from technically-grounded disagreement or inadvertent failures, and so on. Moreover, flexible enforcement, recognizing the limited capacity of regulations to capture diverse and constantly emerging sources of harm, would make eliciting cooperation a primary goal of enforcement.[15]

Stronger enforcement powers, as used selectively by some inspectors, can in fact enhance the enforcement official's capacity to elicit cooperation. By suspending enforcement, at least long enough to listen to the arguments and problems of and alternative abatement measures suggested by the regulated enterprise, the inspector gains a reputation for reasonableness and constructiveness, a reputation he can trade on in pushing for qualitatively important compliance efforts. Like the plea-bargaining prosecutor, a flexible enforcement official can explicitly trade nonenforcement of less important violations for prompt action on more serious ones, or even for reforms that go beyond the letter of the law. The California Food and Drug agency, for example, suspended civil penalties against a smallish drug manufacturing firm on the condition that it hire a recognized quality control consulting firm and implement its recommendations. The FDA recently adopted a program whereby enforcement officials, rather than enforcing detailed "good manufacturing practice" rules uniformly in all plants, undertake, in consultation with company officials, to analyze critical weak points or ways in which each company's particular quality-control or production system might break down.[16]

In this and a few other enforcement programs, the inspector not only disseminates information, but acts as a consultant: he analyzes organizational weaknesses in the regulated firm and serves as a catalyst to stimulate self-analysis. This approach also rests on the fact that many regulated enterprises, largely because of the threat of enforcement, employ specialists who are "natural allies" of the regulators--industrial hygienists, quality control, safety and environmental engineers--whose careers and professional identities are linked to regulatory goals and who have more detailed knowledge of needs and priorities than outside regulators can hope to acquire. What those specialists may lack is intra-corporate power. Flexible enforcement would concentrate on stimulating in-house experts to rethink their needs while directing the coercive power of government to problems those specialists perceive as most serious and "solvable."

Reform Strategies: Building Self-Regulatory Capacities

In recent years a number of regulatory programs have begun to draw back from strict enforcement of specific, governmentally-prescribed specification or standards in favor of compelling businesses to establish strengthened self-regulatory systems that have the promise of tailoring control measures more precisely to risks posed by the particular firm's situation and personnel. The details of regulation, in effect, are delegated to the firm. For example:

> CAL-OSHA agreed to drop routine inspection and enforcement of general regulations at a giant construction-site in return for an agreement whereby the general contractor and the unions formed a joint safety committee with powers to plan and implement safety standards. CAL-OSHA inspectors would in turn periodically monitor the effectiveness of the self-regulatory system.

> The Department of Agriculture recently adopted a plan to cut back intensive governmental inspection and detailed standards for meat-packing plants where companies demonstrate they have established highly sophisticated quality assurance programs.
>
> The EPA's "bubble concept" grants large industrial installations discretion to reduce air pollution in an imaginary bubble over the plant in whatever way and in whatever order company engineers devise; this is a departure from enforcement of regulations establishing nationwide fixed emission levels and, in some cases, mandatory abatement devices, for each point source.
>
> California regulations require truck operators to establish a written preventive maintenance and self-inspection program. State inspectors, accordingly, concentrate on evaluating the quality of the company's maintenance system (conducting spot checks of vehicles themselves, however), reserving frequent and exhaustive enforcement of detailed government maintenance regulations only for firms with a poor overall program.

A parallel strategy is to strengthen the intra-corporate position of in-house regulation systems by compelling companies to designate specific officers to be responsible for the program, to specify their responsibilities in writing, and to report and certify compliance measures to the regulatory agency. The SEC has required some corporations to establish audit committees, comprised in part of outside directors, to police corporate compliance with anti-fraud regulations, and it requires accountants to certify that the corporation has an effective system to prevent violations of the Foreign Corrupt Practices Act. Christopher Stone (Where the Law Ends) has suggested that key personnel such as safety engineers or researchers in charge of tests on new drugs should be licensed and subject to "disabarment" for failure to discharge their responsibilities or for "caving in" to Pressures from "production." FDA

regulations for intravenous fluid manufacturers require them to grant quality assurance units absolute authority to reject raw materials, prevent shipments and stop processes that they believe unsafe or that violate company-prescribed quality control rules (which must be approved by the FDA).

A related regulatory strategy is to build organizational competence by compelling business to hire trained specialists for certain key compliance-related positions (such as quality control, drug testing, operating certain equipment). California requires nursing homes to hire certified administrators, head nurses, and even to provide certain extra training for aides. A CAL-OSHA regulation requires employers to establish safety training programs for workers.

Limits of Reform

Experience indicates that governmentally-mandated self-regulatory systems, even though they appear to delegate discretion to the regulated enterprises themselves, can easily lead to almost the same kind of unreasonable results as direct regulation, particularly in the area of reporting and paperwork burdens. Enforcement officials, after all, remain responsible for discovering abuses of the "delegated discretion." Hence they demand documentation of how decisions are made, whether they are having positive effects, and so on. For purpose of bureaucratic routine, moreover, they insist that documentation and lists of steps companies take to prevent harm

must be set forth in uniform reporting categories. Each time an abuse of discretion is discovered or a serious accident slips through the precautions of a self-regulatory system--and this will occur, even in systems as sophisticated and supported by market and liability law pressures as commercial airline maintenance--the regulators respond by adding another layer of mandatory self-inspections or reports, a new series of double-checks and signatures, and so on. Thus, many corporate personnel officers and charge nurses in nursing homes come to be preoccupied as much with documenting and justifying their deeds in writing as with doing them. The tendency to cumulate "self-regulation" requirements was revealed when the Federal Railroad Administration recently announced that, upon review, it could safely eliminate certain mandatory self-inspection steps that would save the railroad industry $100 million a year.

There is a tendency, moreover, to enforce procedural requirements just as literally as substantive ones. One reason is that many paperwork or reporting violations are intrinsically not serious; failure to record a signature, file a report on time, complete a measurement, issue a notice, and so on, ordinarily does not in itself cause any harm. Such requirements are "second-order" precautions. There is every temptation, therefore, for regulated enterprises not to take such violations seriously, and thus a corresponding inclination by regulators to punish such violations strictly. For unless regulators show the company it takes documentation requirements seriously, it is feared, the entire reporting program will be flawed, the agency will fail to make definitive reports to its legislative overseers, and it will be accused of failing to enforce the law.

Perhaps more fundamentally, agency officials often feel compelled to enforce both substantive and procedural regulations strictly and uniformly because they lack the expertise to enforce them flexibly. Enforcement officials often find it difficult to judge precisely how great a risk would be posed by failure to adhere to a particular requirement, whether it be a guard on a machine or a signature on a batch-release form. (This uncertainty about the level of risk, in fact, is often what makes regulation necessary in the first place). Faced with this uncertainty, the enforcement official also risks making two kinds of errors--being unnecessarily strict or being unduly lenient. Being too strict and legalistic imposes unnecessary costs on the regulated enterprise, and the inspector may be accused by the firm's representatives of being unreasonable. Being unduly lenient, however, typically entails a much larger set of risks for the official. Even if leniency is justified, failure to apply the regulations literally can lead a disgruntled complainant to call an inspector's superior (with intimations that the inspector is "in bed with the company") or somehow make his complaint public. A federal inspector or a supervisor or a co-worker come down the same trail and discover his omission. Competitors of the firm in question might learn about it through safety appliance salesmen and complain that the agency is giving some firms special treatment. But more importantly, should the inspector's discretionary judgment be mistaken, should the violation (or even a related one) turn out to be really dangerous, it might lead to a serious accident. In the ensuing investigation, any sign of an unpunished violation is quickly interpreted by the newsmedia (and some politicians) as proof that the agency is to blame.

Just as threatening as the possibility of catastrophe is the fear of scandal. Any regulatory official inclined to grant front-line enforcers discretion to suspend enforcement and work for cooperation where appropriate takes the risk that sooner or later, however competent and dedicated his staff, some inspectors will turn out to be foolish or corrupt, and sooner or later the lapses of judgment or corruption will be uncovered. In the event of catastrophe or scandal, the best defense for an agency is that it has done everything possible--within its strained and inadequate budget, of course--to enforce the regulations as they are written, as uniformly and equally as possible, without bias or favor.

Not surprisingly, therefore, bureaucratic and political superiors tend to chastise enforcement officials more severely for being too lenient, for "taking the law into their own hands" (thus jeopardizing the safety and the rights of those the regulations are supposed to protect), than for being too strict and imposing "extra costs" on the regulated enterprise. "People," it is rationalized, are supposed to take precedence over "profits." To the agency, therefore, the unreasonableness caused by legalism is an "externality," essentially outside its legal and moral responsibility, a cost born by the regulated enterprise, not the agency. Sticking to the rules, avoiding difficult, time-consuming, and potentially dangerous discretionary judgments about the seriousness of a violation or the "good faith" and competence of the regulated firm, is the safer, easier, and most predictable course.

II. Regulating Schools

There are many obvious parallels between the evolution of protective regulation and the growth of legal controls over public schools. In both fields, there has been remarkable growth in the sheer number of rules and regulations, at least in part because local entities--schools or factories--have been seen as insufficiently attentive to their broader social responsibilities and as unresponsive to less legalistic modes of control. "Dumping" children who pose discipline problems into special education classes is treated as analogous to the dumping of industrial wastes into the environment. Ignoring the special needs of non-English-speaking or economically disadvantaged students is like an employer's indifference to the need of inexperienced factory workers for more protective equipment than the experienced worker might require.

The standards promulgated by the government to control school districts are in some cases stated as conditions on grants-in-aid, but given the financial pressures on most urban school districts, they are just as mandatory, in effect, as EPA regulations. Like environmental and safety rules, educational regulations require investments in new kinds of teaching personnel and administrators and thus shift responsibility for deciding the precise trade-off among conflicting claims on scarce resources away from local administrators to government officials in Washington or state capitals. Therein lies the potential for unreasonableness. Like the world of business, school systems are surprisingly diverse, and centrally-formulated regulations that strike an appropriate definition of responsible behavior in one district may be unnecessary in others.

The "Unreasonableness" Problem: Some Apparent Differences

On the other hand, there are several striking differences between legal controls on schools and business regulations that might lead one to expect a weaker propensity toward legalism and unreasonableness in the former.

1. Education Law Standards Grant More Discretion to "The Regulated"

Business regulators, perhaps more confident in their technical judgments about how to produce certain effects (safety, pollution abatement, etc.), or more confident that business could afford or invent the necessary control techniques if really forced to, often have prescribed very specific performance standards, facilities, machines, and procedures. Lawmakers in the educational field, on the other hand, more often have left substantive standards vague or open-ended. The Education for All Handicapped Children Act (PL94-142) requires an "appropriate education" for all children. Title I of ESEA provides funds for meeting the educational needs of economically and educationally deprived children but does not precisely define those needs or dictate the content of the courses or prescribe the levels of educational attainment that the students must reach. Federal laws require expanded programs for non-English-speaking students, much as the Clean Air Act requires greater industrial expenditures on air pollution control. But bilingual education standards, at least as originally articulated in Lau v. Nichols and the 1974 Equal Educational Opportunity Act, do not prescribe any particular "technology" for assisting those students (unlike the EPA, which prescribes best available technologies for specific processes) or any particular educational outcomes (unlike the EPA, which prescribes measurable maximum emissions per day or per pound of processed material).

Instead, like some of the more recent "reforms" in business regulation the federal laws concerning educational equity have sought to mandate effective self-regulatory systems. They have required local school districts to devise their own plans and programs, to appoint special education compliance specialists, to establish local program committees with parent representation, to conduct assessments of each child's needs, and so on. Thus, the regulations appear to be primarily procedural or structural rather than substantively specific. To use Paul Berman's terminology, they appear to opt for "adaptive" rather than "programmed" implementation.[17]

2. Legal Sanctions for Violations are More Limited, Less Automatic. The educational laws have not vested in federal officials the same kinds of strong and automatic legal sanctions that business regulators have acquired. Individual school officials, unlike corporate officers, are not subject to personal criminal prosecution for violations of regulations. The major sanctions provided by law are a cut-off of federal funding or suits for reimbursement. These remedies, however, are extremely difficult to apply because of their severity, their counterproductive effects (fund cut-offs would further limit educational offerings for disadvantaged students) and because such actions often generate strong political pressures against federal officials by local legislators. Federal auditors have no legal authority to impose less drastic (and more acceptable) sanctions on noncomplying school districts, such as immediate fines or remedial orders. Although parents can sue school districts for violating federal education law, the paucity of specific substantive (as opposed to procedural) standards in those laws would seem to allow the courts more discretion (and more discretion to consider the local school administrators'

"professional judgment") than courts confronted with a suit by a labor union complaining of a corporation's violation of an OSHA regulation requiring certain machine guards or maximum noise levels.

3. Regulatory "Failures" Are Less Dramatic

One of the reasons for the cumulation of overinclusive business regulations and legalistic enforcement is that new regulations are often passed in reaction to horrifying catastrophes or dramatic scientific discoveries--a railroad tank car full of toxic chemicals crashes, hundreds of cattle die from pesticides in their feed, the ozone layer is shown to be depleting, and so on. For the inspector faced with deciding whether a violation or partial compliance is serious or not, a mistake can mean injury or death. For the rule-makers, it seems better or err on the side of more safety, wider margins of error and so on.

For educational regulatory officials, on the other hand, a district's failure to file program evaluation reports, or retest mentally handicapped students, or give extra help to those who speak English poorly might ultimately have serious consequences for the life-chances of the child, but these consequences are hardly as dramatic and irreversible as sudden death or cancer. New education regulations less often are drafted in the kind of crisis atmosphere that follows a dramatic fire, work-place explosion or environmental catastrophe. There is more likely to be an understanding on the part of education policymakers, moreover, that educational "technology" is uncertain and choices arguable than among lawmakers dealing with controls on manufacturing or transportation technology--and this is reflected in the prevalence, mentioned above, of mandatory self-regulation as opposed to direct specification of techniques of education. Finally, while business regulators at times seem to believe that corporations easily can finance compliance out of profits or pass

them on to thousands of consumers via price increases, educational lawmakers, one would think, would be more cognizant of the fiscal problems of local schools, the difficulty of raising taxes, the opposition to diverting resources from mainstream classes, and so on. Hence, one might expect less of a tendency toward overreaction and disregard of the costs and difficulties of compliance, both at the law-making and law-applying level. This is reflected, at least in part, in the fact that major education laws, unlike business regulations, often include funding provisions--the dispensation of federal tax monies to help the regulated school systems comply.

Nevertheless, despite these "advantages," the regulation of schools seems to have been affected, although it is harder to say to what degree, by some of the same dynamics toward legalism and unreasonableness noted in our discussion of business regulation.

Open-Ended Standards and Regulatory Unreasonableness

By declining to stipulate specific educational "technologies" for teaching disadvantaged students, substantively vague educational statutes, as noted above, might have been expected to promote more informed, non-legalistic, "reasonable" disposition of disputes about the laws' requirements. In fact, the result has been a great deal of legal controversy and, at least arguably, a great deal of legalism and unreasonableness.

The traditional critique of open-ended statutory standards in business regulation--such as the requirement of "just and reasonable" rates or "feasible" safety measures--was that such standards would be interpreted to favor unduly the interests of the regulated industry. That critique rests on the assumption that pro-regulation interests usually are disorganized and weakly represented in the administrative process, and that regulatory officials would be overwhelmed by regulated firms' constant presence,

control of information, or political and economic influence. But that configuration of interest groups does not necessarily describe regulatory programs initiated in the 1960s and 1970s, and contemporary regulatory reformers consciously have attempted to structure the programs in order to deter "accommodative" interpretations of the law. Thus in major educational regulatory programs, the "regulated" are represented in the administrative process, to be sure, by associations of school superintendents and on some issues by the National Education Association, but their presence has been balanced and sometimes outweighed by well-organized advocacy groups for racial and ethnic minorities and for handicapped students, whose members have often been placed directly on regulatory staffs* and, most important, who have been legally empowered to take federal and state agencies or school districts to court for failing to take seriously the statutory goals of full equality. In this context, the lack of substantive specificity of educational statutes, which seem to give local districts discretion, in fact provide more discretion for ideologically-minded enforcement officials and judges to read their own substantive views into the law, even to the point of unreasonableness.

*Among the advocacy organizations involved in Washington lobbying in the administration of Title I, for example, are the National Advisory Council for the Education of Disadvantaged Children, the National Welfare Rights Organization, the Legal Standards and Education Project of the NAACP, the Lawyers Committee for Civil Rights Under Law and the NAACP Legal Defense and Educational Fund. Paul Peterson, in his forthcoming book on federal education policy, reports several instances in which "exposés" or detailed recommendations issued by such organizations resulted in tighter and more detailed regulations and increases in the Office of Education's enforcement staff. Peterson, Federal Policy and American Education (A Twentieth Century Fund study) Ch. IV.

Several major laws invite such a result by failing to incorporate any positive obligation (for enforcers or judges) to consider the costs of expansive definitions of open-ended statutory standards. Statutory goals such as "appropriate education" for each child or "equal educational opportunity" (like the goals of "health" and "safety" in the 1970 Clean Air Act and the OSH Act) represent enormously ambitious aspirations, perhaps never fully attainable in a world of limited resources, conflicting values, imperfect techologies and fallible human beings. Yet the statutes do not obligate enforcement officials to weigh the incremental benefits and costs of each additional mandatory step toward full equality and educational achievement. The government, moreover, is not required to fully fund each and every act of compliance required of a school district; the rights provided by a statute may thus exceed the resources provided to pay for them. The result is that administrators and judges, pressured by advocacy groups invoking the unqualified statutory language, often have been induced to require compliance measures whose educational benefits probably are exceeded by costs (in terms of other educational and social goals) or which simply exceed the financial and technical resources of local school systems.

One example is provided by the cumulation of regulatory requirements under the Equal Educational Opportunity Act of 1974, which calls for states to "take appropriate action to overcome language barriers that impede equal participation by the students." HEW regulations pursuant to the law called on all states to conduct assessments and prepare plans tailored to each child's linguistic needs and to train bilingual teachers. Then some courts,

at the urging of concerned parent groups and with the backing of certain educational theorists, extended these procedural steps into substantive requirements, interpreting the law to require schools to provide bicultural as well as bilingual education, e.g., Puerto Rican history, literature and culture for Puerto Rican youngsters,and in one notorious case in Ann Arbor, Michigan, to require special instructional programs (and teachers) for black students who speak non-standard "black English".[18] Judicial decisions become precedents for administrative action. The Office of Civil Rights in HEW demanded that 334 school districts must begin bilingual-bicultural instruction or lose federal school aid. These steps may be warranted, to be sure, by an expansive reading of the sweeping statutory goal of "equal participation". But these steps also would clearly be very expensive, controversial, and of questionable priority given scarce educational resources. The point is that the open-ended statutory language provides no "stopping point" at which bilingual goals should be balanced against other educational goals.

Open-ended standards in business regulatory statutes, such as "clean" water or "safe" workplaces, also may be susceptible to overly-expansive interpretations, but they are also more amenable to rational economic analysis and scientific measurement, more easily reduced to regulations requiring specific and hence "testable" abatement measures than the essentially moral and more emotional issues of social justice raised by laws designed to promote educational equality. If OSHA proposes a regulation on workplace fumes or particles, manufacturers can challenge the necessity for the particular level of cleanliness chosen, relying on epidemological or laboratory studies of adverse health effects, or relying on expert engineers and economists to challenge OSHA's theory of the effects of the proposed standard; and OSHA and the courts will have to provide countervailing scientific and economic analyses to sustain the regulation.[19]

If an OSHA enforcement official tries to push a particular manufacturer to adopt a controversial safety and health device, the detailed specification or performance standards in the regulations provide the manufacturer grounds on which to appeal and also give the courts a relatively objective handle on the question, neutralizing to some extent the personal views of OSHA, the employer, and the judge. Not so with vague educational statute criteria, such as the "appropriate education" called for by the Education for All Handicapped Children Act. When a parent claims that placement in a specialized private school (at the public school district's expense) is the most "appropriate" education for her child, there are no fixed standards or engineering traditions against which to test the claim. The decision will rest on an almost intutive attempt to match the unique characteristics of that child with those of the particular schools in question, and the fate of a disputed decision will depend primarily on the sympathies and attitudes of the hearing examiner or judge who happens to sit in review. Not surprisingly, that very category of decisions has become a constant source of appeals, litigation and further "legalization" of the special education process. The underlying issue, "Should the public schools be paying for very expensive private placements?" is treated as the "legal" issue of which educational service is "appropriate"--or as it seems to be interpreted, "most appropriate"--for the handicapped child, and limited public funds often are used to pay for placements that above average income parents previously had paid for themselves.[20]

Accountability, Enforceability and Mistrust.

As suggested by the earlier discussion of mandatory self-inspection rules for railroads and other businesses, the fact that educational laws tend to dictate mandatory procedures and reports rather than substantive teaching techniques or substantive outcomes does not exempt them from the possibility that they may prove to be unreasonably costly to comply with in relation to the benefits those procedures produce. The time and effort involved in arranging conferences with experts and parents of handicapped children for preparation of individual plans under PL 94-142 is by now legendary. Stearns, Greene and David, who studied the implementation of that law in 22 school districts in 9 states, reported:

> "In the 1978-79 school year, while the impact of 94-142 on schools was considerable...many (service delivery personnel) resent the extra time spent on coordination, planning and paperwork that decreases the time they devote to delivery of services."[21]

The propensity of procedural requirements to become more and more elaborate is illustrated by the federal programs for bilingual and vocational educational education. Under administrative interpretations of bilingual education statutes and regulations, school districts have been compelled to conduct surveys to ascertain annually the number of limited English-speaking students in their district, each child's first-acquired language, the language most often spoken in her home, then classify her level of English proficiency and assign her to an appropriate program.

Under the 1976 federal vocational education act, local agencies must file plans that not only list courses they intend to offer, but also show how those courses are coordinated with the offerings of other agencies in their area, and how they fit in with the state vocational education plan. The state plan must provide statistics on labor demand and supply to justify the occupational skills selected for training, state how special efforts will be made to provide "adequate training to economically and academically disadvantaged persons, for handicapped persons, for the bilingual," and set forth procedures "to reduce sexual stereotyping in occupations." In addition, according to Charles Benson:

> "Each year each local agency is to count each student enrolled in an occupational program to the detail of a six-digit occupation code... identifying the student by race and sex. The local agency is also required to show enrollments of disadvantaged, handicapped, and bilingual students...how many students complete specific types of vocational programs and what happened to them later, i.e.,...got a job...got a job in a line of work for which they had been trained, etc." [22]

Each of these requirements, of course, is entirely rational in terms of program goals. But they clearly require an enormous amount of time and effort, additional administrators, secretaries, offices, specially designed forms, etc. Benson observes that "there is a certain amount of cynicism about the accuracy of all this reporting."

One feature of procedural requirements that makes them costly and burdensome is that the school district not only must comply with programmatic requirements but also must <u>prove</u> that the requirements have been met, as in the case of some business regulations, discussed earlier, where the

regulated entity must prove it is continuously complying. To prove it hasn't been arbitrary, the district must articulate in writing its goals and objectives for each program (or in the case of handicapped students, for each child). Decisions must rest on reviewable written rules and "hard evidence" (tests, surveys, statistics), not on intuition or professional judgment." Thus HEW officials cited the New York City special education program (which according to a federal judge was an especially dedicated, expensive and substantial one) for using "subjective, non-validated standards" in deciding whether students were so emotionally disturbed and disruptive as to be assigned to special schools, notwithstanding the fact that the school system's existing procedure already called for multiple reviews and conferences with parents.[23] Such consultations with parents and psychologists, moreover, must be carefully formalized and documented. Under PL 94-142, not only must schools prepare an individualized educational plan (IEP) for each student, but parents must sign it, presumably to prove compliance with notice and consent objectives. Indeed, to "legally protect the district from noncompliance with (mandatory) notification and consent procedures," says the Stearns et al report mentioned above. In one urban district studied 19 separate procedures and forms had to be completed and filed (including several permissions, evaluations, conference and test reports) before a teacher could effectively arrange for a student in her classroom to be tested and placed in a special education class.[24]

*The requirement to submit detailed written proposals concerning the use of funds, and to provide for objective measurement of educational results, it should be added, also was required for Title I (aid to low-income students) and many other federal categorical grant programs. The 1978 Title I amendments (partly because self-evaluations by many school districts were castigated as insufficiently scientific and objective) provide that the evaluations must be prepared by "independent" evaluators, pursuant to standards prescribed by federal officials.

This formalism stems from the emphasis on accountability that pervades the process of "delegating" discretionary decision-making (or more accurately, allowing discretion to stay where it originally was) in a regulatory system. Accountability, for one thing, satisfies certain needs of enforcement officials--especially their need to demonstrate to their political superiors, to advocacy groups(and perhaps to themselves) that they are doing something to ensure that the law is being complied with and to prevent abuses of discretion by recalcitrant districts. Because auditors (like inspectors) come only infrequently, they cannot easily and reliably observe basic processes such as how children are taught, how thoughtfully classification decisions are made, and so on. Just as business regulations often specify particular facilities and equipment because inspectors can only observe that which endures, if enforcers of educational laws are to operate efficiently, educational regulations must prescribe the preparation of enduring documents--written records suggesting how well children are taught (tests, lesson plans, statements of objectives) and records of who participated in classification decisions. And just as equipment specifications are only rough proxies for real risks, the completion (or failure to complete) required forms and reports often will correlate poorly with the real issue--teaching quality or thoughtful classification. Thus Stearns et al in their study of PL94-142 observed that special education teachers

> "almost universally believe in individualized programming and mutual exposure of handicapped and non-handicapped children, but often do not see any relationship between these goals and the required procedural changes. Some perceive the detailed requirements to be a waste of time or worse." [25]

The elaboration of formal accountability devices and requirements for rational documentation would not necessarily lead to unreasonableness if they were not required of all districts and all cases. Criminal law enforcers require regular reports only from those on probation and parole, persons with a prior record of serious lawbreaking, not from all citizens. But in educational regulation, the same cumulation of regulatory requirements occurs as noted in the discussion of business regulation: new reporting, testing and other procedural rules are generated to close loopholes or correct gross abuses perpetrated by "bad apples" (districts wholly indifferent or antipathetic to the statutory goals), but in the relentless concern for uniformity of treatment, those requirements are imposed on <u>all</u> districts, including the reasonably "good apples". Thus Jeremy Rabkin has written of the Office of Civil Rights in HEW, "It was one thing to charge particular Texas school districts with discrimination ('on the basis of national origin') because they had left otherwise capable Chicano children to vegetate in classes for the mentally retarded simply because of their difficulties with the English language," but quite another for HEW to go on to require all school districts in the nation to remedy language deficiencies of "national origin-minority group students" by undertaking special surveys and diagnoses of all students from non-English speaking homes. [26]

In business regulation, strict uniformity of treatment is the prevalent legal norm partly because government does not want to appear to aid Firm A by regulating it less stringently than its competitors (even if Firm A actually is more socially responsible). Thus when one infant-formula factory negligently left out an important ingredient during a production change, the FDA hardly could impose expensive precautionary and reporting rules on that factory while leaving its competitors exempt from those extra costs, even if the latter had enjoyed a spotless quality control record; the new regulations were made applicable to all. In educational regulation, the functional equivalent to that "competitive even-handedness" is the

government's obligation to accord political "equal treatment" to political sub-units. Thus to impose affirmative bilingual instruction requirements on the offending Texas schools and not on other school districts, even those with a good record, would be politically dangerous.

Another reason for uniform treatment, however overinclusive, in business regulation is the dominance of the theory that businesses are all intrinsically profit-hungry bad apples. None can be trusted; they all must be "on probation." What of school districts, however? Do regulators assume they too are amoral economic calculators, looking to avoid the spirit of the law if at all possible? Many laws do seem to be based on that assumption. To some regulatory officials and many advocacy groups, local school boards are dominated, in Martin Shapiro's phrase, by "bad, white middle class Babbitts," philosophically resistant to legally mandated affirmative action for racial and ethnic minorities, as evidenced, it might be argued, by their past failures to provide equal education. From this perspective, strict and detailed accountability rules, uniformly enforced--rather than reliance on the undocumented and unreviewable "professional judgment" of local administrators--seems essential. But perhaps more important than this "offensive" justification - the desire for more control--is a "defensive one; the desire of politicians and enforcement officials to protect themselves from charges of waste and ineptitude. Most education regulations are tied to funding programs, and the bête noire of all funding agencies is misapplication of funds by their clients. To funding agencies, a scandal involving waste or misuse of funds is the analogue of a death-dealing physical catastrophe for a safety-regulating agency--it is the type of error it can be most severely blamed and punished for. Because so many school districts are financially hard-pressed (like the cash-

short and marginally profitable businesses that tend to be the worst apples in health and safety regulation), and because early Title I (aid for economically disadvantaged students) administration turned up a large number of instances of misuse of funds, education enforcement laws and regulations enacted since are all-the-more inclined to treat all districts as potential offenders, elaborating fund-allocating and accountability rules in ever-tightening detail.[27]

Yet another ingredient in the exfoliation of formal legal controls is mistrust by pro-regulation advocates and law-makers of the enforcement bureaucracy itself, based on the theory that regulators will be captured by the regulated, especially if they share a common professional training, as in the case of educators. As in business regulation, the presumed antidote is to empower beneficiary groups to sue both regulators and the regulated for failure to implement statutes and regulations strictly.* And in fact,

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*Under federal law providing aid to retarded and other developmentally disabled students, recipient states must establish independent advocacy organizations, empowered to sue service providers for noncompliance with applicable laws and regulations.

Federal civil rights statutes encourage lawsuits to correct violations by school districts and inaction by law enforcement officials by allowing winning parties to collect their counsel fees from the defendent agency. The Office of Civil Rights in HEW was in fact the object of repeated, successful suits by minority group organizations concerning inadequate enforement, and was subjected to court orders requiring more prompt and thorough response to complaints.

advocacy groups often have sued state and federal administrators, demanding closer monitoring of and tougher enforcement against local districts. Once in court, the spirit of legalism--the judgment of human behavior wholly in terms of written rules and regulations--flourishes, at least in the hands of many judges. Enforcement officials may "lose" the case--and hence lose face--for failure to require strict adherence to each specific regulatory provision, regardless of the educational importance of the provision or the seriousness of the omission. The specification of the law in each particular court case, moreover, acquires the status of a precedent, requiring administrators to apply the same definitions and compliance steps in their dealings with all school districts. For example, in Nicholson v. Pittenger, a 1973 decision by a federal district court,[28] Pennsylvania state school administrators were held to have violated federal regulations requiring full "comparability" in educational services as between schools that receive Title I aid and the "richer" schools that do not.* The court's opinion does not discuss the extent of the disparities, the problems of preventing them, or their importance in educational terms (perhaps because nobody knows

*The "comparability" concept stems from Title I provisions designed to ensure that federal monies are used only "to supplement, not supplant" pre-existing services and that students in the program are receiving educational services comparable to those being offered students in better-off districts. (It is not hard to imagine the complexity of the effort that would be required to demonstrate such "comparability", if the standard were taken truly seriously).

their importance). The court-ordered remedy, moreover, was to call for more documentation and formal rationalization. The state, the court observed critically, "approved Title I applications which do not state on a program by program basis the degree of change expected by the end of the school year " (as if insisting on such predictions would have been important). Local school districts were ordered to report in more detail job descriptions for personnel in all schools, lists of programs offered, and so forth, so that "comparability" could be assessed more precisely and quantitatively, and they were ordered to step up their efforts in requiring testing and evaluation.

Literal Compliance and Its Consequences

The proliferation of detailed accountability rules might not be problematic if the regulations were only sporadically enforced or enforced in a selective, flexible manner. The few studies that exist, however, indicate that enforcement of education laws, whatever its weaknesses, is sufficient to produce a considerable amount of literal compliance and a considerable amount of unreasonableness. The precise amount, to be sure, is hard to estimate or compare to business regulation, but it is the dynamics of the enforcement process that leads to unreasonableness that concerns us here.

Despite the understaffing of enforcement agencies and the absence in major education laws of graduated and easily-employed legal sanctions (such as fines or summary corrective orders), federal enforcement officials are not toothless. Their visits, even if not frequent, are not entirely

predictable and are viewed by local school administrators with some concern. Like enforcement officials in many business regulatory programs, federal auditors have found that their chief sanctions are not formal but informal--the ability to harrass nonemploying entities with more intensive scrutiny, or the capacity to subject them to adverse publicity. Burnes reports, for example, that local districts worry about showing a good compliance record to federal auditors primarily because of the "tedious, time-consuming and expensive" experience of being subjected to "audit exceptions," school superintendents and board members also worry about the political embarrassment of having such exceptions reported in the press as failures to comply with federal laws designed to help the disadvantaged, raising the possibility of losing $xxxxx in federal aid.[29] Similarly, in a RAND study conducted for HEW, Paul Hill found that violations mean the district can be singled out for more intensive audits in the future, which constitutes a real sanction in itself; that federal auditors readily resort to open criticism of noncompliant individual administrators and districts; that "federal charges of mismanagement are faithfully reported by local newspapers;" and that local superintendants fear this sanction.[30] Yet audit exceptions are also difficult to avoid, because as Hill points out:

> "The rules governing Title I now resemble a complex code of statutory law, and like a code of law they place a heavy burden on the user to find the relevant provisions and decide what all of them mean in combination. Local program administrators, who are not lawyers but educators, have neither the time nor the inclination for such analysis. As a result, they are seldom sure whether their entire program is in compliance or not."

In consequence, there are real incentives for local school administrators--never known for their boldness--to stick to the regulations as literally as they can in order to minimize risk and uncertainty.*

Of course, it is not difficult for experienced enforcement officials or civil rights lawyers to point to instances in which local administrators have flagrantly violated applicable regulations or even evaded court orders. Some districts are "bad apples", at least on some issues, and many districts, like business firms, will invest considerable energy in resisting regulatory requirements that they think unreasonable or counterproductive on grounds of principle. But few districts can afford to be bad apples on most issues, with the attendant risk of bad publicity and expensive lawsuits. Enforcement officials in most business regulatory agencies acknowledge that their programs would collapse without the general commitment of most firms to "voluntary compliance" with most regulations once they are on the books, an attitude that stems mostly from an aversion (for business reasons) to being publicly

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*Similarly, commenting on studies of the implementation of PL94-142, Christine Hassell observed that deviating from federal or state regulations "are a source of fear and uncertainty to those at the local level who are working in new roles and areas of responsibility...Under these conditions, even professionals...will adhere to rules rather than following their own discretion." Christine Hassell, "Learning vs. The Law", Institute for Research on Educational Finance and Governance, Stanford University, IFG Policy Notes, Winter 1981.

labeled a "corporate law-breaker," but partly from the commitment of most executives to being "law-abiding citizens," to contest regulations they may dislike through lawful political or judicial channels.* A large proportion of school administrators almost surely share this attitude. Even more than business executives, one would expect them to be committed to compliance with law and bureaucratic regularity. Those I have spoken with seemed preoccupied with figuring out what the regulations really required of them; it hadn't really occurred to them to spend much thought and energy challenging the reasonableness of the regulations.

Thus Stearns et al found generally widespread compliance with the forms and procedures required by PL 94-142, despite complaints about their unreasonableness,[31] and more recent studies show a reasonably high level of compliance with the complicated reporting and aid-targeting regulations under Title I programs for disadvantaged students.[32]

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*Of course, even if most managers have this attitude with respect to most regulations, that still leaves room for a large number--in absolute terms--of wilful corporate regulatory violations. To recognize those violations, however, does not undercut the general point about the high proportion of law-abidingness with respect to most regulations.

It is not clear to what extent federal (or state) enforcement officials interpret and enforce the detailed education regulations in a literal, legalistic manner. Some officials undoubtedly adopt a somewhat flexible enforcement style with respect to some regulations.* But there are also indications that many do not, and given the powerful incentives for enforcement officials to protect themselves against charges of ineptitude, it would be surprising if legalistic enforcement were not widespread. As in the case of many business regulatory agencies, strict enforcement is a "safer" posture. After all, instances of "lax enforcement" easily can be brought to light by a second audit conducted by another agency, or by a lawsuit brought by advocacy groups, or via public charges by almost anyone that the agency is disregarding the rights of the disadvantaged. Consider, for example, the comments of an official in the California regional office of the Orfice of Civil Rights, responsible for enforcing laws preventing discrimination against the handicapped. Asked by a researcher if regulatory requirements ever were adjusted to different conditions, capabilities or attributes of different schools or districts, he replied, "There better not be. If I find out about it, those EOSs [Equal Opportunity Specialists] will hear

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*During the early 1970s, for example, Office of Education officials were reluctant to enforce Title I requirements that federal funds be used to "supplement, not supplant" local spending. See U.S. National Institute of Education, Administration of Compensatory Education (Washington: U.S. Department of Health, Educational and Welfare, 1977) pp. 40-44.

from me." And again, "We're here to enforce the laws...If you're guilty, you're guilty. There are no extenuating circumstances." While this might appear to be defensive hyperbole, compliance officers and special education teachers from Berkeley, California (a district with an active and committed special education program), view OCR enforcement officials in terms remarkably similar to the way corporate safety specialists talk about OSHA or businessmen in Janesville, Wisconsin talk about inspectors from other agencies. They complain that OCR officials, could, but don't,

> "act as colleagues with the Districts in implementing the legislation. I don't mean that they should be soft but they could help us to implement."

Another said:

> "From my experience they are a police agency. They appear to operate without a sensitivity to the global problems of the [school district]. There is no consideration for the whole gestalt....They don't appear to deal with the real issue--the child. Not one has asked about where the child is today. They deal only from the....bureaucratic point of view".
>
> "They're not cooperative with us. They're like the police showing up. It doesn't have to be that way. We want to do what's right. We're committed to providing education to all kids in [the district]."

Of course, if one believes that the District is a "bad apple," that its version of "education for all kids" in fact gives short shrift to the handicapped-- as may be the case in some districts whose officials make such statements--then the OCR's stance may be justified. But failure to make such distinctions, or even to try, is the essence of legalism.

As in business regulation, legalistic enforcement of detailed accountability schemes (or school administrators' belief in the necessity for strict compliance) leads to a considerable amount of nonproductive effort, diverting those local educators who are in fact dedicated to the statutory goals from important tasks to low-priority "compliance" activities. A 1977 National Institute of Education study, based on a survey of State Title I directors, concluded that the extensive regulations dealing with planning and delivery of educational services "establish a complex process of instructional planning that is not demonstrably connected to.... the quality of instructional services."[33] Weatherly and Lipsky studied the implementation of a Massachusetts law that, like PL 94-142, requires schools to prepare an individualized plan for each student, including mandatory conferences, meetings with parents, written justifications, and so forth in every case. Special education teachers and administrators seemed to take the purposes of the law very seriously, said Weatherly and Lipsky, despite weak monitoring efforts by the state. But they

regarded the legally prescribed steps to be a substantively meaningless "bureaucratic hurdle to be gotten over as quickly as possible" in a majority of cases.[34] The administrators differentiated these "routine cases" from those that they in fact regarded as problematic, in which "there was some disagreement among school personnel regarding the assessment or educational plan, considerable expense...[or] troublesome parents...." The difficult cases were thought to be only 15-25% of cases in two districts, perhaps 50% in a third district where parents seemed to be more demanding. At any rate, the prescribed set of procedures in <u>all</u> cases seemed vastly overinclusive and costly to the professionals on the scene.

One consequence of such overinclusive requirements is the demoralizing experience of wasted time and effort. Stearns et al, in their study of the impact of PL 94-142, found "It was an exception, rather than a rule, for service givers to make significant use of the IEP documents that had been developed" even though formulating them "consumed more time for staff than any other procedure we observed."[35] Teachers reportedly make little use of the expensive, complicated tests results required by Title I regulations, partly, perhaps because the tests are often methodologically flawed; teachers regard them simply as formalities required to retain Title I funding.[36] More importantly, compliance with procedural requirements can displace activities that teachers and other service providers regard as more important or educationally valid, just as industrial safety engineers complain about the way in which OSHA inspections divert them from higher priority safety goals. Thus a school psychologist complained to researchers, "I used to spend half of my time testing and the other half in classrooms working

with teachers and kids. Now, with PL 94-142 requirements, I spend close to 90% of my time doing assessments."[37] And the school districts, Stearns et al note, spend more effort negotiating with highly-educated parents over whether the public school should pay for specialized private services than on the proper classification of the disadvantaged children who presumably were to be the primary beneficiaries of a more finely-individualed and participatory pupil-assignment process.[38]

When a school district's efforts are diverted toward ensuring compliance with regulations, or being able to prove it is in compliance, it may even have to forego more imaginative, but harder to document, instruction techniques. With respect to enforcement of Title I compensatory education regulations, Burnes states:

> Because many local districts have historically found it easier to document that services are supplementary (to regular non-Title I programs) when the children are in a "pulled out" class, most districts...do pull children out of the regular classroom to receive Title I services, even though few research data suggest this is a more effective teaching strategy.[39]

Arthur Wise argues that pervasive requirements of evaluation by testing induce some educators to focus on those educational goals (such as inculcation of certain reading and math skills) that can be easily measured.[40] For teachers who see their role as broader--stimulating creativity, transmitting a cultural heritage and modes of thought, teaching oral skills, etc.--a focus on meeting testable objectives seems in no small degree to trivialize education and divert them from more important objectives. Not surprisingly, resentment follows. There are reports that teachers cynically attempt to manipulate test scores (depressing them in the fall, boosting them in the spring) to avoid bureaucratic hassles, but also, I suspect, because they feel no compunction about sabotaging a prescribed procedure they believe is not educationally very valuable.

Another response to documentation requirements is demoralization. Like the nurses referred to earlier, teachers are dedicated to doing good deeds rather than justifying them in writing. "I was hired as a teacher, not a record keeper," one special education teacher complained to researchers, and at least some special education teachers have abandoned the field or requested different assignments because they hate having to spend so much time on defensive paperwork and conferences rather than teaching.

Legalistic procedures can also lead to "overcompliance", that is, measures by school districts that are required neither by the letter or spirit of the law but that will help keep the district out of legal trouble with auditors, parents and advocacy groups. The prevalent but educationally questionable "pulling out" process, where students receiving Title I aid are removed from their regular classroom for special classes, is one example. In a study of the implementation of PL 94-142, some school districts were found to have "given in" to questionable demands of aggressive parents of handicapped children for special services because the administrators wished to avoid due process hearings and appeals; those legal proceedings, administrators noted, often draw media attention and make both the administrators and the district "look bad".[42] Conversely, fears of legalistic enforcement can lead to defensiveness and resistance. The fear of lawsuits and claims to expensive private services for handicapped children, one study indicates, has led in some districts to protective, defensive strategies by administrators in their relationships with parents--reluctance, for example, to tell parents that their child needs a service presently unavailable in the public schools, but that would be available privately

at the district's expense, under PL 94-142.[43] Charles Benson noted that some local educational authorities are returning federal vocational moneys to the state office, rather than comply with the detailed planning, reporting, and follow-up requirements.[44]

School districts do not seem to have resorted to the increased legal contestation and appeals that have marked the business response to legalistic regulation. Perhaps this is because there is in fact less unreasonableness and less resentment. But it also may stem from reluctance to do legal battle with a federal agency on which the local district is dependent for funding, along with different attitudes (among schools as compared with businessmen) about the propriety of fighting to retain autonomy from government bureaucrats. And there certainly has been enough resentment to stimulate a significant political counterattack, as reflected in the Reagan administration's proposals to eliminate regulation of schools by consolidating categorical grant programs into unrestricted bloc educational grants to the states. Thus as in the case of business regulation, the bitterest fruit of legalistic regulation has been an undiscriminating "deregulation" movement that threatens to undermine the positive contributions of the programs.

Possibilities and Limits of Flexible Enforcement

With respect to business regulation, it was suggested that a strategy of flexible enforcement could be not only more reasonable than legalistic enforcement but also more effective, in that it could lead to more cooperation and more imaginative approaches to the achievement of regulatory goals. The assumptions that underlie that suggestion would also seem to be applicable to the enforcement of school regulations.

One assumption, for example, is that while explicit legal mandates and some threat of enforcement is necessary, most regulated entities are res onsive to informal regulatory instructions, or at least those that appear reasonable under the circumstances, without having to be hit with severe and automatic sanctions for all violations. Thus Weatherly and Lipsky, as noted earlier, found Massachusetts schools committed to compliance with the goals of special education statutes despite the absence of frequent monitoring by state officials, partly due to belief in the legitimacy of the law and its goals, partly because of pressure from parent groups. And when such attitudes exist in the schools, strict enforcement of detailed accountability regulations may do more harm than good.

Perhaps the most important achievement of tougher business regulation has been stimulating corporations to hire in-house professionally-trained technical experts (safety, quality control, environmental engineers, etc.) who share with enforcement officials the general values and goals of the regulatory program (often having been recruited from government agencies), who manage shadow inspectorates inside corporations, and who become advocates for regulatory goals in internal struggles over resources. Similarly, Paul Hill points out that local school officials appointed as "compliance officers" and told to master the detailed federal regulations on expenditure of special education grants remain local employees,

> but their special expertise--and thus their professional standing--is based on the...programs they manage. These officials constitute a special interest group within the...education agencies that employ them. Within some limits, the federal government can rely on them to take autonomous action in behalf of compliance with the intent of federal programs.[45] (emphasis added).

(I underline the word "intent" to emphasize the distinction between overall goals and the specific mechanisms suggested in the regulations.)

Of course, the threat of enforcement has been crucial in creating the in-house compliance staff and in giving them a measure of "clout". Moreover, the existence of some specific regulations is important in this regard, because, as Berman and McLaughlin observe, the categorical nature of Title I regulations helps local special education specialists mobilize support for their programs vis-a-vis other budget items[46] (just as quality control engineers cite FDA regulations when dunning management for funds for projects the engineers think important). For this reason, replacing categorical grant regulations with unrestricted bloc grants might severely undermine the position of special education specialists at the local level, although this is far from certain. Flexible regulation on the other hand, would suggest retention of the legal power provided by categorical regulations, but would use it selectively or sparingly. The idea of flexible regulation calls upon enforcement officials to regard local special education specialists as allies and expert informants, to omit punishment of (or adverse publicity for) formal violations that local officials can

show are not serious,* and to direct governmental pressure toward problems the local specialists regard as important.

As in the enforcement of business regulations, flexible enforcement would require enforcement officials (and perhaps judges, as well) to be alert to the reasons for a school district's failure to comply with regulations. If some Title I violations represent wholly unjustifiable attempts to divert federal funds for general educational purposes, other violations, a study by Berman and McLaughlin points out, represent not attempts to evade the general purposes of the law but attempts to achieve them in ways that local educators believe to be fair and appropriate--even if not in accordance with the regulation drafted in Washington. Berman and McLaughlin conclude:

> Our research indicates that effective educational change requires adaptation of guidelines....to local conditions. Oddly enough, such adaptations are sometimes thought of as deviations. We would hope that federal policy would encourage these largely healthy deviations.[47]

Moreover, as the business regulation experience indicates, when officials criticize or penalize any and all departures from the regulations, without acknowledging that the good faith judgments of professionals in the particular setting might be more important than the steps required by

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* Noncompliance with Title I regulations, for example, is undoubtedly of varying degrees of seriousness. It is wholly indefensible to spend compensatory funds on audiovisual aids for the auditorium, on salaries for football coaches, or on band uniforms. It is less reprehensible, however, when funds are spent on new educational programs that are not perfectly targeted toward only the most disadvantaged students as required by the dictates of federal "concentration" regulations. And it is still less serious when funds are spent on plausible compensatory education classes but without meeting regulations stipulating clear articulation of objectives and frequent and "scientific" evaluation of results.

the rule-book, they incur resentment and run a serious risk of destroying the cooperative impulse so necessary to the achievement of statutory goals.

Many corporate regulatory violations, as noted earlier, are due not to calculated evasion but to some sort of "organizational" failure--weaknesses in supervision, gradual deterioration of safety and maintenance routines, failures to follow up on or detect sources of harm--all contrary to the official corporate policy. This suggested regulatory strategies aimed primarily at building regulated firms' capacity to comply.

Similarly, Berman and McLaughlin imply that the main reason most local districts fail to meet Title I objectives is not calculated evasion but a sort of organizational incompetence. This might include indecision about what will work, getting overwhelmed by regulatory deadlines and administrative difficulties, and letting Title I planning demands slide in the face of the many other problems, demands, and crises faced by urban schools. From this standpoint, as Richard Elmore argues, enforcement officials would be better advised to conceive of their jobs in terms of consultation or "helping"--providing information, organizational analysis and instructional advice rather than enforcing rules.[48] Berman and McLaughlin say, "School districts generally do want outside help but do not want this assistance to be highly prescriptive and inflexible." What they need is assistance in changing organizational arrangements and attitudes that would expand local definitions of educational responsibility in accordance with regulatory purposes.[49] The USOE does now send "management teams" to

the states not only to address compliance issues but also to "concern themselves with the management capacity" of the state agencies "to promote more effective programs." But assistance from both federal and state officials "seems to be addressed primarily to showing (local district) officials how to run compliant programs," not "to helping...(them) provide more effective programs."[50]

The capacity-building strategy was illustrated by Judge Weinstein's decision in Lora v. Bd. of Education of New York.[51] The judge found the City had violated the Civil Rights Act and federal education regulations by referring disproportionate numbers of minority children to special schools for emotionally disturbed and disruptive students. But he recognized that the "racial imbalance" problem was a difficult one, largely because white parents tended to send their children to private schools when the district sought to refer them to special schools. And he recognized that the City had not been violating the law deliberately or acting in bad faith, having set up certain due process mechanisms. The judge thus rejected the plaintiffs' demands for more explicit rules to govern classification and referral of students, saying "Courts are not in a position to lead the most advanced of the educators...in enforcing nonexistent standards." And the remedies Judge Weinstein called for were essentially educational, e.g., he ordered school administrators to inform all teachers

in the system of the court's concern about possible bias in decision-making, to give relevant referral committees special training to avoiding racial or cultural bias in evaluation, to provide clearer (and fewer) notice forms for parents and provide an advocate for children considered for referral, and to increase minority representation on decision-making staffs. One could imagine regulatory enforcement officials, too, using their legal power with respect to violations not to impose penalties or cite audit exceptions but to strike "plea bargains" whereby the district agrees to undertake "capacity-building" reforms (as opposed to more faithful and detailed adherence to the testing and documentation regulations).

In business regulation, as discussed earlier, movement toward flexible enforcement, however desirable, is politically and bureaucratically difficult. The inevitable recurrence of catastrophic accidents and discovery of new environmental contaminants lead to a recurrent escalation of legal rules, and the threat of such occurrences, combined with the technical difficulty of assessing risks, makes it hard for enforcement officials to be sure it is safe for a firm to substitute its own control method for the one specified in the rules. Informal negotiation with business over legal obligations, moreover, always carries the risk of criticism for "selling out," being captured or corrupted. Legalistic enforcement is safer.

Do those same factors militate against flexible enforcement in the educational area? In some ways, the conditions for flexible enforcement are more hopeful. The business regulation agencies that have moved toward flexible regulation tend to specialize in a particular industry or a limited set of technologies, such as truck safety regulators and some (not all)

specialized FDA units. OSHA inspectors who go from industry to industry are least capable of making subtle distinctions, analyzing weaknesses, seeing through weak excuses, or offering constructive suggestions. On that continuum, education law enforcement officials are relatively specialized. With proper training and indoctrination in a less legalistic conception of enforcement, they perhaps could learn to be more selective in enforcement and more helpful to local schools.

On the other hand, school regulators deal with an uncertain technology. Since no one knows for sure what would be a good compensatory or bilingual education strategy, and views on the subject differ (sometimes violently), it may be hard for the Office of Civil Rights official to decide whether a deviation from a program-related regulation is serious or not, or whether a failure to document adequately a referral of a handicapped child covers up a failure to think about the case honestly and carefully. Here, too an insistence on following the rules is a far simpler choice for the bureaucrat.

Similarly, it is hard for enforcement officials to make the value judgments implicit in many decisions concerning nonliteral compliance. Many controversies arising under PL 94-142, as noted earlier, while "legally" about the "appropriate education" due a handicapped student, are also about whether the school must pay for privately provided special education services, and hence are about redistributing scarce educational resources to a special few. A school's refusal to make the referral at bottom may be based on an implicit cost-benefit argument--the added benefits for the special student (especially because it sets a precedent) are not worth the costs this and

similar decisions will impose on other students by diverting resources from "regular" education. Lacking conceptual tools or hard data to "test" such a cost-benefit analysis, and lacking any statutory guidance concerning the maximum a community's education system should be compelled to sacrifice in order to assist the most unfortunate, it is obviously very hard for an enforcement official or a judge to evaluate the school's argument. Moreover, the characterization of the choice in terms of violating or respecting the legal rights of the handicapped child makes any consideration of the issue in cost-benefit or compromise terms legally unorthodox and, in the views of some advocacy groups, highly illegitimate. And such advocacy groups, it must be remembered, are empowered to take the school district to court, appeal the decision of a trial judge who seems to be "wateringdown" the unqualified rights established by statute, or as Jeremy Rabkin as described, bring effective lawsuits against an enforcement agency that articulates a policy of treating some complaints or alleged violations as less worthy of prompt investigation than others.[52] Uniform and literal application of the regulations thus is a legally and politically safer course for enforcement officials and judges.

Similarly, there is always the danger that "flexible" enforcement officials will err, that an independent investigation will reveal serious misallocation of funds or a highly-publicized violation of some childrens' rights, thus embarrassing the enforcement agency's leadership. These "scandals" can occur even in a strict regime, of course, but a record of stringent insistence on accountability requirements at least provides the agency with some defenses: it can place the blame on insufficient appropriations for enforcement.

At bottom, the major impediment to flexible regulation is a particular style of legal and administrative thought that views rules and rights as fixed. To modify them on grounds of the costs of vindicating them is regarded as essentially illegitimate. Yet the weight to be given economic considerations (that is, the distribution or allocation of resources) is the central policy issue in both business and school regulation. Is the proper goal of air pollution control, or worker or product safety, the cleanest or safest environment technologically possible, or is it the safest environment or product possible without engendering adverse effects in terms of other values (losses in product utility, higher prices, lower productivity and employment, etc.)? Is the "appropriate education" for handicapped kids required by PL 94-142 the best imaginable education (or something approaching it) or the best education possible without detracting very much (however much that is) from education for the others? But once statutes or regulations guarantee meeting "the needs of the child" or legal rights to an appropriate education (or the right of the worker to a safe workplace or of a citizen to clean air), the capacity to compromise, to deal with the issue in terms of "trade-offs," is inhibited. Trade-offs are subject to legal appeals and political attack--unless judges and bureaucrats begin to think of rights as nonabsolute, as implicitly qualified by context and the possible adverse consequences to others of taking them literally.*

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*Judges do so in some other contexts, such as in "balancing" approaches to the interpretation of First Amendment freedom of speech, whereby, under the "clear and present danger test and its variants, the right to free speech is qualified in circumstances in which it clearly and inevitably impinges on other governmental and social values, such as "law and order".

In the business regulation sphere, regulators have been provided with legal authority to think in trade-off terms at the rule-making level by recent statutes and Presidential orders that require agencies to analyze the relative costs and benefits of alternative proposed regulations. President Carter's Regulatory Analysis Review Group and a similar panel established by President Reagan were authorized to review rules proposed by Executive Branch regulatory agencies and to issue public criticism of those that the governmental economists did not think cost-efficient. It might be useful to subject proposed educational regulations to similar prior analyses, or to review existing accountability regulations with an eye to reducing the most extensive reporting and testing requirements, especially with respect to those districts that do not have a demonstrated record of bad faith in the implementation of statutory goals. The analogue at the enforcement level, to prevent "individual case unreasonableness" stemming from legalistic application of generally reasonable but inevitably overinclusive regulations, would be a legal mandate requiring and authorizing enforcement officials and judges to consider exceptions, modifications and variances, without an unreasonably heavy burden of paper justification.

Constructing criteria for such non-uniform treatment and developing a legally-defensible rationale for a flexible mode of implementing regulations and broadly-stated student rights are important goals for the regulation of schools and of businesses alike. The alternative, as suggested earlier, may be continuing political backlash and wholesale "deregulation" that throws out the baby of progress along with the bathwater of regulatory unreasonableness.

Footnotes

1. See Jerome T. Murphy, "The Paradox of State Government Reform", The Public Interest (Summer, 1981), pp. 124-129.

2. See Robert Lane, The Regulation of Businessmen--Social Conditions of Governmental Economic Control (New Haven: Yale University Press, 1954).

3. Eugene Bardach and Robert A. Kagan, Going By the Book: The Problem of Regulatory Unreasonableness (Philadelphia: Temple University Press, in press) (A Twentieth Century Fund Report). The research on which the study was based entailed interviews of field inspectors and higher enforcement officials of the Federal Food and Drug Administration, the Occupational Safety and Health Administration, the Louisiana Air Pollution Control Administration, and the following California State agencies: the Division of Occupational Safety and Health, the Food and Drug Division and the Nursing Home Division in the Department of Health, the Bureau of Motor Carrier Safety, the Milk and Dairy Section of the Department of Agriculture, and the Bay Area Air Pollution Control District.
   In addition, we interviewed numerous managers and engineers in companies regulated by the above agencies, concentrating on a limited number of firms in certain industries: iron and steel foundries (4), aluminum manufacturers (2), automobile assembly plants (2), blood banks and blood products manufacturers (2), petroleum refineries (3), trucking firms and trucking departments (3), nursing homes (2), and dairy products manufacturers (2). We also interviewed labor union officers in four of the above companies and safety experts from two insurance firms.

4. See, e.g. W. G. Carson, "White Collar Crime and Enforcement of the Factory Acts," British Journal of Criminology (Oct. 1970) p. 394; Keith Hawkins, Environment and Enforcement (London, MacMillan Press, forthcoming); Steven Kelman, Comparing Countries, Comparing Policies: A Study of Occupational Safety and Health Regulation in the United States and Sweden (Cambridge, Mass.: MIT Press, 1980).

5. John Dunlop, "The Limits of Legal Compulsion," The Conference Board Record, March 1976, p. 27.

6. See James C. Wilson, "The Politics of Regulation", in James McKie, ed., Corporate Responsibility and the Business Predicament (Washington: The Brookings Institution, 1974) pp. 135-168; Michael Levin, "Politics and Polarity: The Limits of OSHA Reform," Regulation, November/December 1979, pp. 33,36.

7. Paul Danaceau Regulation: The View from Janesville, Wisconsin And A Regulator's Perspective (Washington: U.S. Regulatory Council, March 1980), p. 10.

8. See John Mendeloff, Regulating Safety: A Political and Economic Analysis of the Federal Occupational Safety and Health Program (Cambridge: MIT Press, 1979); Lawrence S. Bacon, Bargaining for Job Safety and Health (Cambridge: MIT Press, 1980); Albert L. Nichols and Richard Zeckhauser, "Government Comes to the Workplace: An Assessment of OSHA," The Public Interest, Fall 1977, pp. 36-39.

9. Council on Environmental Quality, Tenth Annual Report (Washington, D.C., U.S. Government Printing Office, Dec. 1979), Table 12-4, p. 666.

10. See studies reported in Mendeloff and Bacon, op. cit. n. 8.

11. See Bruce C. Vladeck, Unloving Care: The Nursing Home Tragedy (New York: Basic Books, 1980).

12. See David L. Sills et al, The Accident at Three Mile Island: The Human Dimension (Boulder, Colo: Westview Press, 1981); "Behind the Crash: FAA Inquiry Charges Many Errors in Manufacturing and Maintenance of DC-10 Airliners", The Wall Street Journal, July 17,1979, pp. 1 and 25.

13. See, e.g. Vladeck, Unloving Care, op. cit., at p. 160; The President's Interagency Task Force on Workplace Safety and Health, Making Prevention Pay (Washington, D.C. December, 1978) Ch. III; Michael Teitz and Stephen Rosenthal, Housing Code Enforcement in New York City (New York: RAND Institute, 1971) pp. 30-31.

14. See Christopher Stone, Where The Law Ends: Social Control of Corporate Behavior (New York: Harper Colophon, 1975); Robert A. Kagan and John T. Scholz, "The 'Criminology of the Corporation' and Regulatory Enforcement Strategies," Jahrbuch fur Rechtssoziologie und Rechtstheorie, vol. 7, pp. 352-377 (1980).

15. See also William K. Muir, Jr's portrait of the "professional" police officer in his Police: Streetcorner Politicians (Chicago: University of Chicago Press, 1977).

16. See Joseph Hile, "Food and Drug Administration Inspections--A New Approach," Food, Drug and Cosmetic Law Journal, February 1974, p. 101.

17. Paul Berman, "Thinking About Programmed and Adaptive Implementation: Matching Strategies to Situations", in Ingram and Mason, eds., Why Policies Succeed and Fail (Beverly Hills, CA: Sage Publications, 1980).

18. See Martin Luther King Jr. Elementary School Children v. Michigan Board of Education, 473 F. Supp. 1372 (E.D. Mich. 1979); Nathan Glazer, "Black English and Reluctant Judges", The Public Interest, Winter 1981, pp. 40; see generally, N. Epstein, Language, Ethnicity and the Schools: Policy Alternatives for Bilingual-Bicultural Education (Washington, D.C.: Institute for Educational Leadership, George Washington University, 1977).

19. See, e.g., Industrial Union Department, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980).

20. See Michael Kirst and Kay Bertken, "How Fair Fair Hearings," a summary of their research findings in IFG Policy Notes, Vol. 2, No. 1 (Winter, 1981) (Institute for Research on Educational Finance and Governance, Stanford University); Marian Stearns, David Greene and Jane L. David, Local Implementation of PL94-142 (Menlo Park, CA: Education Research Center, SRI International, December, 1979).

21. Id. at 91.

22. Charles S. Benson, "Centralization and Legalization in Vocational Education" Paper Presented to Stanford U.C. Berkeley Seminar on Law and Governance, Institute for Research in Educational Finance and Governance, Stanford University.

23. See Lora v. Bd. of Education of New York, 456 F. Supp. 1211 (E.D. N.Y. 1978).

24. Stearns et al, Local Implementation of PL94-142, pp. 89-90.

25. Id at 91.

26. Jeremy Rabkin, "Office for Civil Rights, in James Q. Wilson, ed. The Politics of Regulation (New York: Basic Books, 1980) pp. 325-332.

27. See Lawyers' Committee for Civil Rights Under Law, An Analysis of the Legal Framework for State Administration of Title I of the Elementary and Secondary Education Act of 1965 (Washington, D.C., 1977). M. Timpane, ed., The Federal Interest in Financing Schooling (Cambridge: Ballinger, 1978).

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30. Paul Hill, Enforcement and Informal Pressure in the Management of Federal Categorical Programs in Education (Santa Monica, Ca: The RAND Corporation, 1979).

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39. Burnes, op cit n. 29 .

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50. R. Goettel, "Federal Assistance to National Target Groups: The ESEA Title I Experience, in M. Timpane, ed., The Federal Interest in Financing Schooling.

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52. Rabkin, "Office of Civil Rights", op cit n. 26.